

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**State of New Hampshire**

**v.**

**Donald Foss, Jr.**

**No. 03-S-426**

**ORDER**

The defendant Donald Foss is charged with failure to provide child support to his two minor children in violation of RSA 639:4. Before the Court are defendant's three separate motions to dismiss. These include: (1) RSA 639:4 is unconstitutional; (2) the defendant's indictments are a violation of due process and (3) the Superior Court lacks jurisdiction to hear the case. The defendant also moves the Court to authorize funds that were necessary to hire a constitutional expert in providing an adequate defense. The State objects. The Court held a hearing on this matter on October 16, 2003. For the reasons stated below, the Court finds and rules as follows.

The defendant's argument that RSA 639:4 is unconstitutional on the basis that it erodes the Court's power to issue a contempt order is without merit. RSA 639:4 provides:

I. A person is guilty of non-support if such person knowingly fails to provide support which such person is legally obligated to provide and which such person can provide to a spouse, child or other dependant. The fine, if any, shall be paid or applied in whole or in part to the support of such spouse, child or other dependant as the court may direct.

II. In this section, non-support shall be:

- (a) A class B felony if the arrearage of support has remained unpaid for a cumulative period of more than one year;
- (b) A class B felony if the amount of the arrearage is more than \$10,000;
- (c) A Class B felony if the obligor has been previously convicted of non-support under this section or if the obligor has been convicted of a similar criminal nonsupport offense in another state and the arrearage of support in this state has remained unpaid for a cumulative period of more than one year, or;
- (d) A class A misdemeanor in all other cases.

Whereas the statute provides the state with a specific criminal cause of action against a spouse who, under the statute, is delinquent in providing child support, “[c]ontempt is an offense at common law . . . that is separate and distinct from the matter in litigation out of which the contempt arose.” Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 285 (1978)(internal quotation omitted)(emphasis added). Although it may be argued that the legislature enacted RSA 639:4 to benefit the complainant, and “[i]n civil contempt, the punishment is remedial, coercive, and for the benefit of the complainant”, id., RSA 639:4 is not a civil matter.

The defendant’s argument also fails as to RSA 639:4 eroding the Court’s power to issue a criminal contempt order. Whereas RSA 639:4 is a criminal statute enacted to prosecute individuals who have been excessively delinquent in not paying child support, the purpose of criminal contempt “is to protect the authority and vindicate the dignity of the court” not the complainant. Id. Thus, the character and purpose of RSA 639:4 and criminal contempt are inherently different and do not overlap.

Next, the defendant argues that RSA 639:4 is unconstitutional because prosecution under the statute could render a defendant subject to double prosecution for the same offense and violate the principles of double jeopardy under the 5<sup>th</sup> Amendment

of the United States Constitution and Part I, Article 15 of the New Hampshire Constitution.

The defendant's argument fails as to both the state and federal double jeopardy clause. As to the New Hampshire Constitution, "[t]he double jeopardy clause . . . prohibits multiple prosecution and multiple punishment for the same offense. If the offenses are the 'same' as that term is defined in our double jeopardy jurisprudence, then the clause's bar to . . . prosecution applies." State v. Goodnow, 140 N.H. 38, 40 (1995)(quotation in original); See also State v. Constant, 135 N.H. 254, 255 (1992). In Goodnow, the New Hampshire Supreme Court held that where a defendant was convicted of direct criminal contempt for physically attacking police officers in open court, a subsequent prosecution of the defendant for criminal assault on the same offense "would run afoul of the double jeopardy prohibition." Id.

The double jeopardy situation in Goodnow will not occur under the scenario that the defendant raises here. First, as noted above, a civil contempt order for failure to pay child support and prosecution under RSA 639:4 does not rise to double jeopardy because the former is a civil offense and the latter is a criminal prosecution. Second, unlike Goodnow, where the criminal contempt offense was the same offense in the subsequent prosecution, here, the Court would not hold a defendant in criminal contempt for not paying child support, that would arise to an order for civil contempt, thus eliminating the defendant's perceived risk of double jeopardy.

The defendant's argument similarly fails under the application of the federal double jeopardy clause. The New Hampshire Supreme Court has noted that the federal double jeopardy clause protects a defendant in three ways. See State v. Bailey, 127 N.H.

811, 814 (1986). “First, it protects against a second prosecution for the same offense after acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense.” Id. (quoting Whalen v. United States, 445 U.S. 684 (1980)(Rehnquist, J., dissenting). Because civil and criminal contempt offenses are “separate and distinct” offenses from that of RSA 639:4, and would not arise to the prosecution of the “same” offense, the federal double jeopardy protection is not triggered.

In the defendant’s second motion, he moves the court to dismiss the underlying indictment because of his inability to make child support payments in gold and silver coins as required by the United States Constitution. Article I, clause 10 of the United States Constitution provides in pertinent part that “[n]o State shall . . . make anything but gold and silver coin a tender in payment of debts . . . .”

Although the Court is not aware of any New Hampshire case specifically addressing the issue of whether the United States Constitution requires payment of debts in gold or silver coins and the parties have brought none to the Court’s attention, the decisions of other state and federal courts provide persuasive guidance as to the extent to which the Article I, clause 10 of the United States Constitution impacts a defendants ability to make payments pursuant to a Court order. In particular, a California Court held that the requirement that States receive payment in gold or silver coins was expunged under Congress’ creation of federal reserve notes, i.e. dollar bills. See Spurgeon v. Franchise Tax Bd. of State of California, 206 Cal.Rptr. 636 (1984). The Court reasoned that this clause was inapplicable because payment made in federal reserve notes was established by the United States Congress, not by state government. Id.; see also Union

State Bank v. Miller, 335 N.W.2d 807 (N.D. 1983)(holding that payment of debts may be made in federal reserve notes because Congress declared that such notes shall constitute legal tender). In 1983, the Michigan Appellate Court held that the Constitutional provision requiring payment in gold or silver coins was only intended to limit states' ability to create form of legal tender other than gold or silver coin and did not preclude states from requiring that payment of child support be made in any form of tender authorized by the federal government. Richardson v. Richardson, 332 N.W. 2d 524 (1983); see also Nixon v. Phillipoff, 615 F.Supp. 890 (D.Ind.1985)(holding that provision of U.S. Constitution [U.S.C.A. Const. Art. 1, § 10, cl.1], does not require states to accept only gold and silver as tender).

Consistent with the holdings of the aforementioned cases, this Court finds that Article I, Section 10 of the United States Constitution does not preclude the defendant from making child support payments to the Court in federal reserve notes. From this day forward, litigants are put on notice that any claims or defenses for not making payments to the State due to a lack of access to gold and silver coins are frivolous and subject to sanction.

The Court also rejects the defendant's argument that this Court lacks jurisdiction to hear the within matter because the flag hanging in the Courtroom has a gold-fringed border, indicating that the Court is a military court. As with the gold and silver coin issue, the Court is not aware of any State Court decisions on this issue, nor have either of the parties brought any cases to the Courts attention, however, the Court did find other state and federal decisions which are persuasive. In this regard, the Federal District Court for the Western District of Missouri held that "[e]ven if the Army or Navy do display

United States flags surrounded by yellow fringe, the presence of yellow fringe does not necessarily turn every such flag into a flag of war. Far from it: in the words of the Adjunct General of the Army, ‘[i]n flag manufacture a fringe is not considered to be a part of the flag, and it is without heraldic significance.’” McCann v. Greenway, 952 F.Supp. 647, 651 (W.D.Mo. 1997)(quoting 34 op. Att’y Gen. 483, 485 (1925). In the Federal District Court for the Eastern District of Wisconsin the Court similarly rejected that the yellow fringe on the flag in the courtroom limited the jurisdiction of the Court. The Court declared that “[j]urisdiction is a matter of law, statute, and constitution, not a child’s game wherein one’s power is magnified or diminished by the display of some magic talisman . . . from this day forward litigants in the Eastern District of Wisconsin are put on notice that any claims or defenses based upon the alleged preeminence of the American flag of peace over any other flag are frivolous.” Schneider v. Schlaefler, 975 F.Supp. 1160, 1164 (E.D.Wis 1997); see also Commonwealth of Pennsylvania v. Appel, 652 A.2d 341, 343 (Pa.Super. 1994) (Appellants argument that gold fringe on courtroom flag limits Courts jurisdiction is a “preposterous” claim).

Part 2, article 72-a of the New Hampshire Constitution provides that the Superior Court shall be “the trial court of general jurisdiction.” It is this legal document which creates the jurisdiction of this Court, not the color of the fringe of the American flag. Moreover, there is no doubt that the flag with yellow fringes that hangs in the Merrimack County Superior Court is the flag of the United States of America. Regardless of the particular fringe color that has been sewn onto the flag, the Constitutionally created general jurisdiction of the Court is not diminished. Consistent with the Court’s holding as to gold and silver coin claims and defenses, litigants are likewise put on notice that

claims or defenses based on challenging the jurisdiction of this Court due to the yellow fringe of the American flag hanging in the Merrimack Superior Court will be considered frivolous and subject to sanction.

Finally, the Court denies the defendant's motion to authorize funds to hire a constitutional expert. In light of the three motions that the defendant filed with the Court, it is apparent to the Court that a Constitutional expert was not necessary to provide the defendant with an adequate defense.

For the reasons stated above, the defendant's three separate motions to dismiss and the defendant's request for funds to hire a constitutional expert are **DENIED**.

So ordered.

Dated: 10-23-03

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Timothy J. Vaughan,  
Presiding Justice